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NO. 58255-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAVID E. MCCORMICK,

Appellant.

BRIEF OF RESPONDENT

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1. When a defendant has violated conditions of his suspended SSOSA sentence must the trial court find that the violation was willful before the court may revoke that suspended sentence?

2. Was the evidence sufficient to find the defendant had violated the conditions of his suspended SSOSA sentence?

3. The defendant was ordered not to frequent areas where minors are known to congregate, as defined by his community corrections officer. The defendant was specifically told not to go to schools. Was this condition unconstitutionally vague as applied to the defendant when he went to a food bank located in a convent which was part of a school, where the main building of the school was across the street from the convent, and where the convent was across the street from a second school which was the location of a previous violation of that condition?

4. The defendant did not object to the court considering the affidavit of David Bralley which was appended to the notice of violation. At the hearing the defendant relied on hearsay statements from employees of the food bank and the school. Has

the defendant waived any argument that Bralley's affidavit violated his confrontation rights?

5. Was counsel ineffective when she did not object to the introduction of the witness's affidavit when there was a sound strategic reason for not doing so and the defendant was not prejudiced by the affidavit?

III. STATEMENT OF THE CASE

The defendant, David McCormick, was convicted after a stipulated bench trial of one count of Rape of a Child in the First Degree on July 31, 2000. He was sentenced to a Special Sexual Offender Sentencing Alternative (SSOSA). The court suspended a sentence of 123 months confinement and ordered that he comply with certain conditions. 1 CP 36-47. Four of the conditions imposed by the court were

> 3. Do not initiate or prolong contact with minor children without the presence of an adult who is knowledgeable of the offense and has been approved by the supervising Community Corrections Officer.
>
> 5. do not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer.
>
> 9. Participate and make progress in sexual deviancy treatment with Dan DeWalesche or another treatment provider acceptable to the Court. Follow all conditions outlined in your treatment contract. Do not

> change therapists without advance permission of the sentencing Court.
>
> 10. Participate in offense related counseling programs, to include Department of Corrections sponsored offender groups, as directed by the supervising Community Corrections Officer.

1 CP 46-47.

On May 7, 2003 the court ordered the defendant's treatment terminated because he had complied with the sexual deviancy treatment condition. 1 CP 33-35. One year later, on May 14, 2004, the defendant stipulated that he had violated the conditions of his sentence by having contact with a minor on May 11, 2004. As a result of that stipulation he agreed to re-enroll in sexual deviancy treatment. 3 CP 65-66. The defendant thereafter re-enrolled in sexual deviancy treatment. 2 CP 57-59.

In March and May of 2005 the defendant again violated the condition of his suspended sentence that prohibited him from frequenting areas where minors are known to congregate. The court found he violated that condition on three separate occasions. One of those occasions occurred on the campus of Everett High School. He was sanctioned 120 days for the violations. 3 CP 74, 80-82.

After those violations occurred the defendant's assigned community corrections officer specifically defined for the defendant areas where minors were known to congregate. Those places included schools and churches. RP 9; 1 CP 16.

On March 21, 2006 the Department of Corrections issued a notice of violation alleging the defendant once again violated the condition of his sentence that prohibited him from frequenting area where minors were known to congregate. The Community Corrections Officer alleged a second violation that the defendant had failed to complete a sexual deviancy treatment program by being terminated unsuccessfully on March 21, 2006. 1 CP 16.

The evidence presented in support of the first alleged violation was a report that the defendant had gone to a food bank located in a convent which was used as part of a grade school. The defendant was present at the food bank during a time when school was in session and classes were being held in the convent. The grade school was located in the next block. The convent was across the street from the high school. The notice of violation also included an affidavit from David Bralley. The evidence in support of the second violation was a report from Norman Nelson, the

defendant's treatment provider, that the defendant had been terminated from treatment. RP 11; 1 CP 14, 15-19.

In response defense counsel filed an affidavit acknowledging that the defendant had been a client of the food bank which was located in the basement of the convent. She reported that a food bank employee confirmed the defendant was present at the food bank at 8:45 a.m. She also reported that a school employee said that school starts at 8:00 a.m. and children are escorted to the convent where the food bank is located shortly after 8:00 a.m. for classes. 1 CP 20-22. Counsel also represented that she had spoken to another treatment provider who was willing to take on the defendant as a client. RP 6 Counsel argued that the defendant did not technically violate his suspended sentence. She urged the court to consider some sanction other than revocation. RP 12-13.

The court did find the defendant violated the conditions of his sentence. Given the history of the defendant's actions the court stated it had no alternative but to revoke the SSOSA sentence. RP 15-16. The defendant's sentence was revoked and the original 123 month sentence was imposed. 1 CP 9-13.

IV. ARGUMENT

A. THE VIOLATIONS ALLEGED AT THE SSOSA REVOCATION HEARING WERE PROVEN.

1. Due Process Does Not Require The State To Prove The Alleged Violations Are Willful.

A defendant who has been granted a SSOSA sentence may have that sentence revoked at any time during the period of community custody if the court finds (1) the offender has violated the conditions of the suspended sentence or (2) the offender has failed to make satisfactory progress in treatment. RCW 9.94A.670(10). The decision to revoke a suspended sentence is discretionary. It is based on a determination that the trial court is reasonably satisfied that the breach of a condition has occurred. State v. Badger, 64 Wn. App. 904, 908-909, 827 P.2d 318 (1992) (citation omitted).

The defendant argues that the court must additionally find that the violation was willful in order to revoke the suspended sentence. He further argues that because the evidence was not sufficient to find a willful violation, the revocation order must be reversed.

The defendant made a similar argument in State v. Gropper, 76 Wn. App. 882, 888 P.2d 1211 (1995). This court rejected that

argument finding former RCW 9.94A.200(2)(c)[1] did not require the court to consider willfulness before ordering incarceration for a violation of a condition that does not involve a financial obligation. Gropper, 76 Wn. App. at 885. Like that statute, RCW 9.94A.670(10) does not require the additional element of willfulness in order to justify revocation of a suspended SSOSA sentence. Thus, the court did not need to find the defendant willfully violated the conditions of his sentence before revoking it. It was sufficient that the court was reasonably satisfied that he in fact had violated the conditions of his sentence.

The defendant acknowledges that Washington courts have held that a trial court need not find willfulness when the alleged violation is not related to failure to pay legal financial obligations. BOA at 22. Despite that, he argues that the court should have been required to find the violation willful based on due process considerations.

A probation or parole revocation hearing is not a criminal proceeding within the meaning of either the United States or Washington Constitutions. Thus, a convicted offender does not have the same due process rights as those person accused of a

[1] Recodified as RCW 9.94A.634

crime. In re Boone, 103 Wn.2d 224, 230-31, 691 P.2d 964 (1984). An offender facing revocation of a suspended sentence has only minimal due process rights. State v. Nelson, 103 Wn.2d 760, 763, 697 P.2d 579 (1985) Sex offenders who face revocation of a suspended SSOSA sentence are limited to the same minimal due process rights. State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

To support his position the defendant relies on Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983), and Smith v. Whatcom County District Court, 147 Wn.2d 98, 52 P.3d 485 (2002). Those cases involve probation revocation based on failure to pay legal financial obligations. The Supreme Court recognized that it would be fundamentally unfair to punish a probationer by revoking his probation when he has made all reasonable efforts to pay a fine but, was not able to do so through not fault of his own. Bearden, 461 U.S. at 668-69, 103 S.Ct. at 2070-71. The Court went on to state that willfulness was not a requirement in all situations.

> We do not suggest that, in other contexts, the probationer's lack of fault in violating a term of probation would necessarily prevent a court from revoking probation. For instance, it may indeed be reckless for a court to permit a person convicted of

> driving while intoxicated to remain on probation once it becomes evident that controlling his chronic drunken driving have failed. . . Ultimately, it must be remembered that the sentence was not imposed for a circumstance beyond the probationer's control, "but because he had committed a crime."

Bearden, 461 U.S. at 669 n. 9, 103 S.Ct. at 2071.

The Court's example of the chronic drunken driver parallels the facts in this case. Here the defendant was found to have violated the conditions of his suspended sentence twice before he was ultimately revoked for frequenting a place where minors were known to congregate. In each case he either had contact with minors or was in a place where minors were known to congregate. After the second violation in which he was sanctioned 120 days for having contact with minors the community corrections officer specifically delineated places where the defendant was prohibited from going. 1 CP 15. One of those places was Everett High School, located within the vicinity of the food bank. RP 11. She invited the defendant to ask her if he had any question about whether places he wanted to go were included within the court's prohibition. RP 9. The community corrections officer stated that she was not able to ensure the defendant would comply with the conditions of the SSOSA sentence, and as such he presented a

danger to the community. RP 11. This is precisely the kind of "other context" the Supreme Court was referring to in Bearden.

Although the court need not find the violation was willful in order to impose a sanction for the violation, the defendant is required to show cause why he should not be punished for his noncompliance. RCW 9.94A.634(3)(b). This shifts the burden to the defendant to show that the violation was not willful once the violation has been proved. Gropper, 76 Wn. App. at 887.

The defendant argues this procedure violates due process where the sanction for violation is a lengthy prison term such as the one he is now serving. He relies on Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) and Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004). Neither of those cases supports his position because they do not address a probationer's due process rights when he has been accused of violating his probation.

Moore decided that RCW 46.20.324(1) and 46.20.289 violated procedural due process because each statute allowed a driver's license to be suspended without first affording the licensee an administrative hearing. Moore, 151 Wn.2d at 666. Unlike

Moore, the defendant here was afforded a hearing before his suspended sentence was revoked.

Eldridge considered whether the administrative procedures in place for terminating a person's social security disability benefits violated procedural due process guarantees. Eldridge, 424 U.S. at 323, 96 S.Ct. at 897. The Court concluded that the procedure employed fully comported with due process. That procedure included both administrative and judicial review if a disabled person received an adverse determination from a state agency. Eldridge, 424 U.S. at 336-339, 349, 96 S.Ct. at 903, 909. In doing so the court identified three factors to be considered; (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and (3) the Governments' interest in the burden that additional or substitute procedural requirement would entail.

The defendant analyzes the issue in this framework. The court should not adopt this approach because the due process rights afforded a convicted offender during a supervision revocation hearing have already been delineated in Morissey v. Brewer, 408

U.S. 471, 488-89, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) and Dahl, supra. Those rights include (a) written notice of the claimed violations; (b) disclosure to the parolee of the evidence against him; (c) the opportunity to be heard; (d) the right to confront and cross-examine witness (unless there is good cause for not allowing confrontation); (e) a neutral and detached hearing body; and (f) a statement by the court as to the evidence relied upon and the reasons for the revocation. Morissey, 408 U.S. at 489, 92 S.Ct. at 2604, Dahl, 139 Wn.2d at 400.

The defendant was afforded those rights at his SSOSA revocation hearing. These rights do not require the court to find non-financial violations are willful prior to revoking a suspended sentence. They do not change depending on the severity of the sanction which may be imposed should the court find the defendant had violated the conditions of his sentence.

Even if the Court were to consider the factors set out in Eldridge, the procedure set out in RCW 9.94A.634 and 9.94A.670(10) would pass muster.

A suspended sentence is not a matter of right but a matter of privilege, designed to promote rehabilitation. State v. Kuhn, 81

Wn.2d 648, 650, 503 P.2d 1061 (1972). Any private interest an offender has is limited by that privilege.

The procedures provided for by statute are designed to ensure the rehabilitative goal is met, and if not, to ensure that corrective action is taken. The offenders rights set out in Morrisey ensure that the risk of erroneous deprivation of the privilege of a suspended sentence is minimal. Any risk is tempered by the fact the defendant can produce evidence that his conduct was not willful, thereby mitigating the reasons for revoking the suspended sentence.

Lastly, a requirement that the State prove the defendant's conduct was willful creates the potential to cripple a system ultimately designed to protect the public. That additional requirement would prevent the court from taking action when the community safety and rehabilitative goals of a suspended sentence were clearly not being met simply because the defendant could not or would not follow the court's orders. The defendant's case clearly illustrates this point.

The defendant's history showed that he claimed ignorance of the facts each time he was alleged to have violated the sentencing conditions. In 2004 he had contact with minors, but

later claimed he did not know they were minors. He later claimed he was just waving down a bus. 2 CP 58, 61. It is clear from the evidence presented at the revocation hearing that an ordinary person should have known that the food bank was located on school property. Certainly it was clear that it was located in close proximity to two different schools. One of those schools was the location of a prior sentence violation. There is evidence that the defendant has some cognitive delay as well. If the court were required to find a willful violation then the defendant could escape revocation simply by claiming he does not have the intelligence to understand the facts which should have led him to know which places were off limits to him. Thus the defendant could repeatedly violate the sentencing conditions, and the court would have no recourse to protect the public by revoking the defendant's suspended sentence.

Similarly, any treatment condition would be rendered meaningless. Here the defendant went to counseling sessions. A therapist treating him determined that the defendant was not getting any benefit from that treatment, and therefore terminated the defendant from treatment involuntarily. If the court were constrained to revoking the defendant's suspended sentence only if

the defendant stopped going to treatment on his own, he could not revoke the defendant who fails to make progress in treatment. The defendant would then be an untreated sex offender at large in the community. This result defeats the purpose of the SSOSA sentence; rather than the defendant becoming less dangerous to the community through treatment, he is in fact more dangerous.

In light of the three factors set out in Eldridge, the procedures provided for by statute do meet due process requirements.

The defendant also argues that the required proof amounts to strict liability, which violates due process when the resulting penalty is a lengthy prison term. None of the authority he relies upon supports this proposition.

The defendant cites Lambert v. California, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed. 228 (1957). There the court recognized that punishment may follow without proof of willfulness. The court stated "conduct alone without regard to the intent of the doer is often sufficient." Lambert, 355 U.S. at 228, 78 S.Ct. at 242. The court distinguished wholly passive conduct from acting or failing to act under circumstances that should alert the doer to the consequences of his deed. The defendant's conduct falls in this

latter category. He was on notice that he was required to refrain from certain conduct in order to avoid revocation of his suspended sentence. Despite that, he continued to violate the conditions of his sentence.

The defendant also cites State v. Anderson, 141 Wn.2d 357, 5 P.3d (2000) and State v. Warfield, 119 Wn. App. 871, 80 P.3d 625 (2003). While those cases held that proof of certain offenses required the non-statutory element of knowledge in order to satisfy due process, they say nothing about the standard of proof for revocation of a SSOSA sentence. The court has recognized that due process does not bar the legislature from creating a strict liability offense. Warfield, 119 Wn. App. at 876.

Finally, the defendant has pointed to out of state authority for to support his claim that the court should have found his conduct willful prior to revoking his suspended sentence. That line of authority has been rejected in State v. Hill, 256 Conn. 412, 773 A.2d 931 (2001). Hill found the out of state authority that required the State had to prove a willful violation prior to revocation of probation was not persuasive because it did not make the distinction between financial and non-financial probation violations.

Hill, 773 A.2d at 938-39. For the same reason the Court should not find the defendant's out of state authority persuasive.

2. The Evidence Was Sufficient To Prove The Alleged Violations.

The State bears the burden of showing the offenders non-compliance with a condition of his suspended sentence by a preponderance of the evidence. RCW 9.94A.634. As noted, the evidence is sufficient if the court is reasonably satisfied that the violation occurred. A trial court's decision to revoke a suspended sentence is reviewed for an abuse of discretion. Badger, 64 Wn. App. at 908-909.

a. **The Evidence Was Sufficient To Find That The Defendant Had Frequented a Place Where Minors Were Known To Congregate.**

The first alleged violation was that the defendant frequented a place where minors are known to congregate by visiting the food bank located on Immaculate Conception Grade School property on March 3, 2006. 1 CP 16. The evidence produced by the State and acknowledged by the defendant was sufficient to prove this violation.

The defendant acknowledged that he went to a food bank located in a convent which was part of a grade school. Children were present at the school beginning at 7:50 a.m. The main

building was located in the block just south of the convent. Classes were held in the convent which housed the food bank beginning shortly after 8:00 a.m. The defendant admitted being there at least by 8:45. 1 CP 20-23; RP 3-4.

The State submitted community correction officer Bunes' report and her testimony. Ms. Bunes went to the food bank at 7:30 a.m. and noted numerous children in close proximity. The defendant was recognized by food bank staff as a client. Food bank records showed that he was there on March 3, 2006. Ms. Bunes stated that second grade art and music classes are held in the same building which housed the food bank that the defendant had gone to. The building is across the street from a high school. One of the defendant's prior violations occurred at that high school. Kitty corner from the convent is a church. The defendant had specifically been told not to go to schools or churches. 1 CP 16; RP 8-11.

Based on this record, the trial court did not abuse its discretion when it found the defendant had committed the violation. The condition specifically stated "do not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer." 1 CP 46. It does not

limit his presence to those times in which children are actually present. Children are "known to congregate" at schools. The defendant was specifically told to keep away from schools. In this case the defendant was not only at a school, but he was at a school during a time in which children were present in school. It is immaterial that the community corrections officer did not specifically state that he should not go to the food bank because that food bank was located in a school.

It is also immaterial that children were not in the defendant's immediate presence during the time he was at the food bank. This condition is similar to the school zone enhancement authorized by RCW 69.50.435(a). The enhancement may be imposed even if children are not actually present in the school zone at the time of the commission of a drug delivery because it is rationally related to restricting drug access to school children. State v. Dobbins, 67 Wn. App. 15, 21, 834 P.2d 646 (1992), review denied, 120 Wn.2d 1028, 847 P.2d 481 (1993).

Like the school zone enhancement, the condition here is designed to protect a particular class of persons who are vulnerable in the defendant's presence because of his particular deviancy. Restricting him from places where children may be, even if there

were none in his immediate presence at the moment he happened to be there, promotes the protection of the community and specifically those vulnerable members of the community. Thus, it was sufficient that the defendant be present in a building which was part of a school, particularly during a time when children were known to be present in the building.

b. **The Evidence Was Sufficient To Prove The Defendant Had Failed To Make Satisfactory Progress In Treatment By Being Terminated From Treatment.**

The defendant was ordered to participate in and make progress in sexual deviancy treatment and participate in offense related counseling programs as part of his suspended sentence. 1 CP 46-47. At the hearing the State submitted a Termination Summary from Sno-King Counseling, LLC which stated the defendant had been terminated from treatment. The termination was based on a report that the defendant had been loitering at a church school and two prior similar incidents. The defendant had failed to disclose any of these events in treatment. The treatment provider, Norman Nelson, concluded that the defendant had made no progress in treatment over the previous two years, and further sex offender treatment could not be clinically justified. 1 CP 14.

Based on this evidence the court found the defendant had failed to complete a sexual deviancy treatment program by being terminated unsuccessfully on March 21, 2006. 1 CP 13. The defendant argues that the court erred in doing so because the State had not proved the violation by a preponderance of the evidence because he did not voluntarily leave treatment. As discussed above, the court does not need to find the defendant's conduct was willful in order to find he has violated the conditions of his suspended sentence. The evidence presented established that the defendant made no real progress in treatment.

The defendant points to the fact that he had "graduated" from treatment once, and then re-entered treatment willingly and was making progress. BOA at 20. The success of that earlier treatment was doubtful in light of later events.

In addition, his claimed progress in treatment is contradicted by the evidence. The defendant only willingly entered treatment a second time because he was caught by a community corrections officer contacting minor females in violation of the conditions of his suspended sentence. 3 CP 65-71. One year later the defendant violated the condition that he not frequent areas where minors are known to congregate on three separate occasions by going to a

park, a church, and Everett High School. 3 CP 74-84. Treatment progress reports show the defendant continued to have contact with minors, but minimized or denied his culpability. 1 CP 14; 2 CP 58, 61. These facts support the conclusion that the defendant was not actually participating in treatment successfully, but was simply making a weekly appearance at therapy sessions. Substantial evidence supported the trial court's findings.

Lastly, the defendant points to his attorney's affidavit that another sex offender therapist had agreed to treat the defendant if he was released from custody. This fact has nothing to do with the court's determination whether the treatment conditions had been violated. That fact is only relevant to the defendant's request to be allowed to remain under supervision for the suspended sentence.

B. THE CONDITION THAT THE DEFENDANT NOT FREQUENT PLACES WHERE CHILDREN CONGREGATE IS NOT UNCONSTITUTIONALLY VAGUE.

The defendant was ordered to "not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer." 1 CP 46. He argues that this provision is unconstitutionally vague.

A statute is void for vagueness if either (1) it does not define the offense with sufficient definiteness that ordinary people can

understand what conduct is proscribed or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). Probation conditions are subject to vagueness challenges. State v. Riles, 135 Wn.2d 326, 348, 957 P.2d 655 (1998), State v. Sansone, 127 Wn. App. 630, 11 P.3d 1251 (2005), State v. Smith, 130 Wn. App. 721, 123 P.3d 896 (2005), review denied, 157 Wn.2d 1026, 142 P.3d 609 (2006).

Due process does not require impossible standards of specificity because some degree of vagueness is inherent in the use of our language. "Thus, a vagueness challenge cannot succeed merely because a person cannot predict with certainty the exact point at which conduct would be prohibited." Riles, 135 Wn.2d at 348.

The Supreme Court has held that a condition prohibiting a defendant from frequenting places where minors are known to congregate is not unconstitutionally vague because persons of common intelligence would understand the condition. Riles, 135 Wn.2d at 349, 351. The defendant claims the condition is vague as applied to his conduct because a person of ordinary intelligence would not have known that he could not go to a food bank.

This argument ignores the facts. This was not just a food bank. It was a food bank located in the vicinity of two different schools. It was located in a building used by one of those schools for classes. The defendant had previously been sanctioned for violating this very condition by being on the property of Everett High School, one of the two schools located near the convent housing the food bank. It was also near a church. Before the violation resulting in revocation of the suspended sentence CCO Bunes specifically defined what constituted places where minors are known to frequent. Schools and churches were included in that definition. 1 CP 16; RP 9. Given these facts, an ordinary person would not have had any trouble understanding that he should not use that particular food bank.

C. THE DEFENDANT WAIVED ANY CLAIM THAT HIS CONFRONTATION RIGHTS WERE VIOLATED WHEN HE FAILED TO OBJECT TO ADMISSION OF A WITNESSES'S AFFIDAVIT AND RELIED ON HEARSAY TO SUPPORT HIS DEFENSE.

One of the due process rights afforded a defendant at a probation revocation hearing is the right to confront witnesses against him unless there is good cause for not allowing confrontation. Dahl, 139 Wn.2d at 683. A defendant who fails to object to the use of hearsay and relies on hearsay himself at a

revocation hearing waives a claim that his confrontation rights were violated on appeal. Nelson, 103 Wn.2d at 766.

The defendant claims that Nelson is inapplicable to his case because his counsel did object to the introduction of David Bralley's affidavit attached to the CCO's notice of violation. 1 CP 19. Although counsel addressed Mr. Bralley's affidavit and attempted to discredit it, she did not object to the court considering it. Counsel stated:

> So essentially what the Court has in front of it, the real issue is Mr. David Braley (sic), I believe, who isn't present in court. Mr. Braley (sic) wrote an affidavit to Ms. Bunes, and based on that affidavit, I can certainly see why Ms. Bunes would issue this report...
>
> We are denying that Mr. McCormick said any of those things and that they were, in fact, there at 7:30 in the morning. There is no evidence of that aside from what Mr. Braley (sic) said. In fact, Fran said that she would see Mr. McCormick waiting in the parking lot at 8:45 or a little earlier to line up, because obviously there is a finite amount of supplies.
>
> The other thing that I would point out to the Judge, which would suggest to me that Mr. Braley (sic) is not very credible, is that he told Ms. Bunes at the time in March when Mr. McCormick went to the food bank that they were going every week. This is simply not true because Mr. McCormick isn't entitled to go every week. . .
>
> The real issue here is Mr. Braley. (sic) He is not present. As I wrote in my affidavit, he has been convicted of many offenses, several felonies, one recently. I don't know what this motivation is to write

this affidavit, but I would ask you to find he is not credible.

RP 4-5, 7.

Rather than objecting to Bralley's affidavit, counsel urged the court to consider it and reject it as not credible. Furthermore, the defense relied on its own hearsay from people working at the food bank and the school. RP 13; 1 CP 21-23. Under these circumstances, the defendant may not argue for the first time on appeal that his confrontation rights were violated.

D. COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE TO THE DEFENDANT. THE DEFENANT WAS NOT PREJUDICED BY COUNSEL'S DECISION TO NOT OBJECT TO BRALLEY'S AFIDAVIT ON CONFRONTATION GROUNDS.

Finally the defendant argues that even if he is barred from raising the confrontation issue on appeal, his trial counsel was ineffective for failing to preserve that issue for review. The defendant should not be granted relief on this basis.

In order to establish counsel was ineffective a defendant must show (1) defense counsel's performance was deficient and (2) there is a reasonable probability that but for counsel's unprofessional error, the result of the proceedings would be different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). There is a strong presumption counsel was effective.

McFarland, 127 Wn.2d at 335. If counsel's performance constituted trial strategy or tactics it may not serve as the basis for an ineffective assistance of counsel claim. State v. Henderickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Here there were sound strategic reasons for counsel's decision not to challenge admission of Bralley's affidavit. Counsel's presentation relied heavily on discrediting Bralley's statements. She did so by reminding the court that he was not there, and pointing out his extensive criminal history. RP 4,7. Had Bralley been in court to testify the court would have had the opportunity to assess his credibility in person. The court very likely could have found Bralley credible despite his criminal background because much of what Bralley had to say was corroborated by the defendant and other witnesses. Counsel was more likely to get the court to discredit Bralley's account of the defendant arriving 1 ½ hours before the bank opened, and the defendant's sexualized comments about children, if Bralley was not present in court. The tactic apparently worked because the court did not even mention those additional facts when it stated the reasons for its decision. RP 15.

Counsel may have also decided to not object to Bralley's affidavit because the defense itself was relying on hearsay.

Counsel's affidavit reported what she had been told by people who worked in the food bank as well as in the school administration. Had counsel insisted on a more formal hearing, and objected to Bralley's affidavit on hearsay grounds, the prosecutor would have likely responded in kind. The prosecutor may have moved to strike the hearsay statements from food bank and school personnel, or insisted that they testify in person. This may have made it more difficult for the defense to make its case.

Furthermore, the defendant was not prejudiced by counsel's failure to object to Bralley's affidavit. The only information in Bralley's affidavit that the court considered was also introduced through unchallenged sources. Further, he has not shown that had counsel objected that the results of his hearing would have been different.

The court orally stated:

> I think it's clear there is a violation. Mr. McCormick was on the list at the food bank, and the food bank is on school property. Though it may not be located in the main school, there are children that take classes at the school and who are present at the time that Mr. McCormick is there in coming and going apparently. Even though they may not be dropped off there, they have to get there is some way.

RP 15.

The court properly considered information contained in the violation report. Nelson, 103 Wn. App. at 764 (evidence from the state probation report was reliable even though it was hearsay.) The violation report was not the only evidence upon which the court based its decision. The court also considered the affidavit of defense counsel and the testimony of CCO Bunes. 1 CP 9. Defense counsel's affidavit stated that the food bank is located in the convent of Immaculate Conception Our Lady of Perpetual Help at 2430 Hoyt Avenue. The School is located at 2508 Hoyt Avenue. Counsel confirmed that the defendant had gone to the food bank located in the Immaculate Conception convent in March 2006. The hours of the food bank were 9:00 a.m. to 10:30 a.m. The defendant admitted going to the food bank around 8:30 a.m. on March 3, 2006. School starts at 8:00 a.m. Students are walked over to the convent that houses the food bank shortly after 8:00 a.m. to attend classes. 1 CP 20-22.

Ms. Bunes confirmed the food bank was in the same building in which grade school classes were held. RP 8. She noted in her violation report that there were children in the vicinity of the food bank at 7:30 a.m. She confirmed that the food bank records showed the defendant went there on March 3, 2006. 1 CP 16.

The only additional information provided by Bralley's affidavit was that the defendant was attending the food bank weekly, that the defendant would show up at the food bank up to 1 ½ hours before it opened, and that the defendant has made "vulgar/sexist comments about children." 1 CP 19.

All of the information relied upon by the court to find the violation was also introduced by unchallenged sources. The trial court did not state that it was relying on the additional information provided by Bralley's affidavit to find the violation. Thus, it cannot be said that even if the court had not considered Bralley's affidavit that the outcome would have been any different.

In addition if counsel had objected he has not shown that the trial court would not have given the State the opportunity to call Bralley into court for live testimony. The court had already continued the matter to accommodate the defense. RP 3. It is reasonable to believe the court would have granted a further short continuance. The defendant has also not shown that had Bralley testified, that the court would have rejected his testimony as incredible. Thus he has not shown that counsel's failure to object to the affidavit had any impact on the outcome of his revocation hearing.

V. CONCLUSION

For the forgoing reasons the State requests that the Court affirm the order of revocation.

Respectfully submitted on March 28, 2007.

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